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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 801

ATOMIC OIL COMPANY OF OKLAHOMA, INC.,
Petitioner,

vs.

BARDAHL OIL COMPANY; BARDAHL MANUFACTURING CORPORATION; BARDAHL INTERNATIONAL CORPORATION; and DALE McKEOWN,
Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FARMER, WOOLSEY, FLIPPO & BAILEY
By Lawrence A. G. Johnson and
Robert J. Woolsey

HEAD & JOHNSON
By James R. Head

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Pursuant to Rule 24 (4) of the Rules of the Supreme Court of the United States, the following Supplement to Petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit is tendered.

Two very recent cases illustrating the clear reversible error of the Tenth Circuit's rule of law in this matter have just been published and their discussion in this Petition for Certiorari is deemed crucial.

In regard to the Tenth Circuit's finding that the Petitioner's mark "Savmotor" was descriptive in the absence of any evidence to rebut the statutory presumption of validity as provided in 15 U. S. C. A. § 1057 (b), a recent case emanating from the Seventh Circuit is tendered for the Court's consideration.

In *Henry Heide, Incorporated* v. *George Zeigler Company,* 147 USPQ 383 (7th CA November 19, 1965) the Court below concluded the use of "Jujubes" was a generic term and as such was incapable of valid registration. After examination of the evidence as presented to the Court below, the Court held as follows:

> "The evidence introduced below overwhelmingly established that candy manufacturers for several decades have used in the trade the term 'jujubes' to define a class of gum candy."

The point made in this case was that the Court in arriving at its decision was supported by "evidence" and not just something that the Court concluded on its own, but that seems to be a practice in the Tenth Circuit.

The second point of gross error of the Tenth Circuit was in its finding that under the Doctrine of Secondary Meaning the primary significance of a mark in the mind of a customer is not the product but the producer. Another most recent case which begs to be considered by

the Court in this appeal is *Spangler Candy Company* v. *Crystal Pure Candy Company*, 147 USPQ 434 (7th Circuit December 6, 1965). That Court held:

> "To establish secondary meaning, it is not essential that the retail customer know the manufacturer's name of the product which he desires to buy. As Judge Learned Hand said in the famous shredded wheat case (Shredded Wheat Co. v. Humphry Cornell Co., 250 Fed. 960, 1963, which modified and affirmed 244 Fed. 508) 'The plaintiff has at least shown that the public has become accustomed to regard its familiar wheat biscuit as emanating, if not from it by name, at least from a single, though anonymous, maker, and the second is as good for these purposes as the first.'
>
> "The generally accepted rule is well expressed in Nims on Unfair Competition and Trademarks, 3rd Ed., page 121: 'Secondary meaning may exist between a name and a manufacturer or seller whose identity is not known to the buyer, as well as between a name and a manufacturer or dealer who is known to the consumer. There are many specific articles which are constantly asked for by brand name. The buyer seeks the product of some one particular concern. He does not know its name, or its location, or whether it is a corporation or an individual. He only knows he seeks a particular thing known by a name familiar to him * * *.'"

Further search of Tenth Circuit cases on the matter of anonymous source turned up the case of *Averick* v. *Rockmont Envelope Co.*, 155 F. 2d 568 (10th CA. 1946) which seems to have been ignored by the Court. That case held as follows:

"Although the primary purpose of a trademark is to indicate the origin, manufacture and ownership of the article in the mind of the purchasing public, it is usually associated with the quality of the product which it symbolizes. Trademarks are no longer regarded simply as an indicium of a known source, they now perform the additional of an advertising and selling device."

"The protection of trademarks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same, to convey through the mark in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress."

"A prospective purchaser does not ordinarily carry a sample or specimen of the article he knows well enough to call by its trade name, he necessarily depends upon the mental picture of that which symbolizes origin and ownership of the thing desired."

CONCLUSION

By virtue of the cases as cited above in supplement to our Petition for Certiorari, it is readily ascertainable that at least, insofar as the Seventh Circuit is concerned, the recent trend of cases is certainly against the decision appealed from the Tenth Circuit. For the reasons hereinabove stated and those reasons as set forth in our original Petition for Certiorari, it is respectfully submitted that this Petition should be granted.

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END